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In the

# Supreme Court of the United States.

OCTOBER TERM, 1947.

No.

GARFORD TRUCKING CORPORATION ET AL.,
DEFENDANTS-APPELLANTS-PETITIONERS,

v.

JOSEPH MANN,
PLAINTIFF-APPELLEE.

## PETITION FOR WRIT OF CERTIORARI.

*To the Honorable, the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:*

The petitioners, Garford Trucking Corporation and J. Albert Glogowski, respectfully request that a Writ of Certiorari may issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit in the case of *Garford Trucking Corporation et al.* v. *Joseph Mann*, Fed. (2) (not yet reported) rendered on July 24, 1947, which affirmed the judgment of the District Court entered on November 5, 1946.

### JURISDICTION.

Jurisdiction of this court is invoked under the Act of February 13, 1925, Chapter 229, Sections 1 to 43, Statutes 938, U.S. Code, Title 28, Section 347.

This petition was filed within the three months from July 24, 1947, the date of the entry of the judgment of the Circuit Court of Appeals as required by Section 8 of the Act

of February 13, 1925, *supra* (U.S. Code, Title 28, Section 350).

Notice of this petition, together with a copy of the petition, printed record and supporting brief has been duly served by the petitioners upon counsel for the respondent and due proofs of such service filed with the Clerk, as required by Rule 38 of this Court.

## THE QUESTIONS PRESENTED.

The questions presented involve the correct interpretation of the law of the Commonwealth of Massachusetts as to the responsibility of the principal for the unauthorized negligence of his employee and as to the correctness of the decision of the District Judge in permitting hearsay testimony as to the alleged statements of an agent purporting to establish his state of mind and purpose so as to charge his principal with responsibility for such unauthorized acts of the employee.

The questions are important to the appellants as they involve judgments of $29,000 and are in conflict with the settled law of the Commonwealth of Massachusetts as established by such cases as *Fleischner* v. *Durgin,* 207 Mass. 435; *Sylvester* v. *N. Y. N. H. & H. R. R. Co.,* 217 Mass. 148; *Du Bois* v. *Powdrell,* 271 Mass. 394; *Treasurer and Receiver General* v. *MacDale Warehouse Co.,* 262 Mass. 588; *Morrison* v. *Tremont Trust Co.,* 252 Mass. 383; *Hartnett* v. *Gryzmish,* 218 Mass. 258; *Boston Food Products Co.* v. *Wilson & Co.,* 245 Mass. 550; *B. & M. R. R. Co.* v. *Orduay,* 140 Mass. 510; *Rankin* v. *Brockton Public Market,* 257 Mass. 6; *Robinson* v. *Old Colony St. Ry.,* 189 Mass. 594.

The decision of the District Court and of the Circuit Court of Appeals is also in conflict with the established law and with the decision in *La Abra Silver Mining Co.* v. *United States,* 175 U.S. 423, 499.

The judgment of the District Court and the decision of the Circuit Court of Appeals destroys the well established

principle of law which makes inadmissible hearsay evidence and controverts the decisions of the courts of the Commonwealth of Massachusetts and of the United States Supreme Court which have held repeatedly that alleged statements of an agent made not as a part of the *res gestae* but at a time distant from the happening of the accident and not in the presence of the principal or any authorized representative of the principal are not binding on the principal.

The judgment of the District Court and the decision of the Circuit Court of Appeals removes from the plaintiff the burden of establishing by a fair preponderance of admissible evidence that the relationship of principal and agent existed at the time of the happening of an accident.

Two principal questions presented are: First, that the District Court erred in permitting the jury to consider the hearsay testimony as to statements alleged to have been made by the servant, Glogowski, some two weeks after the accident in the presence of the plaintiff but not in the presence of the corporate defendant or any authorized representative thereof, as to the purpose of Glogowski in operating his automobile upon the route in which he was operating the automobile of the corporate defendant at the time of the alleged accident. Second, that without the hearsay testimony referred to above, there was no evidence on which the jury would have been warranted in finding that at the time of the alleged accident the motor vehicle of the corporate defendant was being operated by its servant on and in the course of the business of the corporate defendant and there being no such evidence other than this hearsay testimony, the action against the corporate defendant should have been dismissed.

## STATUTES INVOLVED.

The construction of no statute is involved in the questions here presented.

## STATEMENT OF THE CASE.

On May 9, 1945, the defendant, Garford Trucking Corporation, was an interstate carrier of property by motor vehicles and the defendant, Glogowski, was in the general employ of the defendant, Garford Trucking Corporation as a chauffeur and operator of such motor vehicle.

The defendant, Garford's, place of business was at South River, New Jersey. It had a branch office at Plainville, Massachusetts, in charge of one McCarthy, as manager (R., pp. 233, 244). On the morning of May 9, 1945, the defendant, Glogowski, who had arrived from New Jersey on the previous afternoon with a tractor and trailer, was instructed by the manager, McCarthy, at Plainville, to take his tractor and an empty trailer to the Draper Warehouse in Framingham where he was to leave the empty trailer and take on a loaded trailer and proceed from there to the Worcester Turnpike known as Route 9, along the Worcester Turnpike to Route 20 and from there on in the most direct route to the main office of the defendant, Garford, South River, New Jersey.

The unit operated by the defendant, Glogowski, consisted of a motor tractor, so-called, on which was the cab occupied by the driver and the motive power of the unit to which was attached a box or trailer by a pin passing through what was called a fifth wheel on the rear portion of the tractor.

The defendant, Glogowski, proceeded to the Draper Warehouse in Framingham and there was attached to his tractor a trailer loaded with bales of wool. From the Draper Warehouse the defendant, Glogowski, proceeded with his tractor and trailer unit until he reached the route known as 126 which intersects and crosses the Worcester Turnpike known as Route 9 in the southerly portion of Framingham.

Route 126 crosses Route 9 on the overpass and to reach Route 9 to proceed in the direction toward Worcester ve-

hicles make a left-hand turn after crossing on the overpass into the main traveled way of Route 9.

The defendant, Glogowski, on crossing Route 9 on the overpass, was signaled by a sailor, stopped his vehicle and picked up the sailor who was trying to reach his home in Saxonville on Route 126.

The defendant, Glogowski, was familiar with the rule of the defendant, Garford, prohibiting the carrying of riders upon motor vehicles and knew that the picking up of the sailor was a violation of that rule (R., p. 218).

In order to take the sailor to his home it was necessary for the defendant, Glogowski, to travel on Route 126 or Concord St., so named, instead of turning left on the Worcester Turnpike or Route 9. Route 126 ran in a northerly direction away from the Turnpike and in the opposite direction from which the defendant, Glogowski, would have traveled had he taken the Worcester Turnpike as directed by McCarthy.

The defendant, Glogowski, had proceeded some distance on Route 126 with the sailor in the cab with him when the collision occurred between the plaintiff's vehicle traveling in a southerly direction on Concord St. and the defendant's vehicle traveling in a northerly direction.

Testimony as to the happening of the accident was conflicting. On the testimony offered by the plaintiff the jury would have been warranted in concluding that the defendant, Glogowski, just prior to the accident was operating his vehicle at a rate of speed in excess of 35 miles an hour (a direct violation of the wartime speed limit prescribed by the Office of Defense Transportation) and was traveling to the left of the middle of the way.

The evidence of the defendant, Glogowski, would have warranted a finding that the plaintiff was traveling to the left of the middle of the way and the accident occurred as the result of the belated attempts of the plaintiff to drive his vehicle to the right of the middle of the way.

The collision substantially demolished the plaintiff's automobile, caused serious injuries to the plaintiff and more or less serious injuries to the defendant, Glogowski, the overturning of the tractor-trailer unit and the throwing about of the bales of wool on the road and adjoining ways, the breaking off of a telephone and light pole and other damage described in the record.

There was evidence from certain police officers called by the plaintiff that Route 126 on which the defendant, Glogowski, was traveling in a northerly direction, ultimately intersected Route 20 in the town of Wayland and that one could then proceed on Route 20 to the point where it intersects Route 9; that the distance from the Worcester Turnpike by way of Route 126 and Route 20 to where Route 20 intersects the Worcester Turnpike was 28 to 30 miles, while the distance from the intersection of Route 126 and the Worcester Turnpike to the intersection of Route 20 and the Worcester Turnpike on the Turnpike itself was 15 miles (R., p. 64).

There was testimony from the same police officers that Route 9, known as the Worcester Turnpike, was a wide through-way route with room for three vehicles traveling abreast on each way, one traveling south toward Worcester and the other traveling north toward Boston; that the route was paved with concrete and was used extensively by motor vehicles; that Route 126 was a narrow way less traveled, black macadam surface; that there were high hills on the route particularly one going through the town of Marlborough.

Evidence was offered by the plaintiff that at the Framingham Hospital where both the plaintiff and the defendant, Glogowski, were removed for treatment following the accident and some week or ten days after the accident, a conversation took place between the defendant, Glogowski and one Davis, also a patient at the hospital and the room-mate of the plaintiff in which the following occurred:

"*Q.* Was there any further talk to refresh your mind about this road on which he was traveling? *A.* He told me, I asked him where he came from, he said he came from Plainville and went to the Draper Woolen Shop and picked up his trailer there and I asked him where he was going and he said New Jersey so I asked him—do you want me to say the word?

*Q.* Well— *A.* What the hell were you going that way for? He said, 'I go that way because I can make better time,' and I said, 'Why didn't you take the Turnpike?' He said, 'I go that way to make better time (R., p. 127).'"

There was also testimony from the plaintiff, Mann, with reference to an alleged conversation between Mr. Davis and the defendant, Glogowski, as follows:

"*Q.* What do you mean by he? *A.* This man Red (Davis) asked Glogowski in the course of the conversation what he was doing on that other road and he said, 'You told me you were going to Worcester.'

*Q.* Who said this? *A.* This Red said to Glogowski, 'You told me before you were going to Worcester. Why did you go across there?' So Glogowski said to Red, 'O I usually take this road, I hit No. 20 over there and, O boy, then you can open it up zoom.' That is the way he described it (R., p. 93)."

Upon the objection of the defendant both of these alleged conversations were restricted by the court to apply only against the defendant, Glogowski and not against the defendant, Garford.

Although the judge charged the jury at the time of the offering of this evidence that they could consider it only against the defendant, Glogowski, in his charge the judge reversed his previous ruling and instructed the jury that

the evidence might be considered by them against the defendant, Garford, in the following language:

"Now with respect to his purpose in taking this route there is some evidence here that you will take into consideration as to his purpose when he was going along Concord Ave. Was his purpose to perform his master's business, his employer's business, was that his purpose? This evidence deals, Mr. Foreman, with evidence introduced here through the plaintiff and a witness by the name of Red. Evidence came into this case that Glogowski, when he was in the hospital, in substance, the sequence is not correct but this is the substance of his conversation, is the talk that Glogowski had with Red at the time he was in the hospital. 'You told me you were going to Worcester; what were you doing on the other road?' 'I usually take that road; I take No. 20 over there and then you can open up and go zoom.' That in substance was the conversation and then Red, I forget his last name, (Mr. Monahan. Davis. The Court. Davis) he testified in substance with respect to this matter, I am now talking to you about what Glogowski said he was going to New Jersey and the question was, 'What do you go that way for' and the answer was, 'I can make better time.'

"Now you can take that evidence into consideration as evidence of Glogowski's state of mind at the time he traveled over Concord Ave. and you can take into consideration in deciding the question, determining the question as to what his purpose was. Was his purpose to perform his master's business in going over Concord Ave. in that connection? You can determine that evidence because that is evidence of his state of mind and I charge you it is competent for you to consider in connection with this important factor that I point out to

you in determining whether or not he was working within the scope of his employment, whether when he went along Concord Ave. as he did at the time of the accident, he was performing his master's business or was intending to perform his master's business." (R., p. 260)

To this portion of the charge the defendant, Garford, took exception. Others of the defendant's objections to the judge's charges are noted on R., pp. 267–270.

## STATEMENT OF POINTS RELIED UPON IN APPEAL TO THE CIRCUIT COURT OF APPEALS.

I. The District Court erred in denying the defendant, Garford Trucking Corporation, motion for directed verdict.

II. The District Court erred in refusing to admit in evidence the testimony offered by the defendants and noted by exceptions in the portions of the transcript of the evidence reported.

III. The District Court erred in admitting testimony objected to by the defendants as set out in the record.

IV. The District Court erred in permitting the argument of the plaintiff's attorney to which objection was made by the defendant's as set out in the record.

V. The District Court erred in those portions of his charge to the jury to which objection was made by the defendants as set out in the record.

VI. The District Court erred in permitting the case to go to the jury against the defendant, Garford Trucking Corporation, inasmuch as there was no evidence that the truck was being operated on the business of the Garford Trucking Corporation by the agent of the Garford Trucking Corporation at the time of the alleged accident.

## REASONS SUBMITTED FOR ALLOWANCE OF THIS PETITION.

The amount of the judgment ($29,000) entitles the defendants to careful consideration of the questions involved.

The judgment of the District Court and the opinion of the Circuit Court of Appeals, if undisturbed, is contrary to the carefully considered decisions of the courts of the Commonwealth of Massachusetts and of the United States Supreme Court.

The judgment of the District Court and the opinion of the Circuit Court of Appeals, if affirmed, will so materially change the existing law as to the admissibility of hearsay evidence as to adversely affect the rights of all parties defendants where hearsay evidence hereto inadmissible will become admissible.

On this aspect of the case the question is of such importance as to warrant review by the highest court of the United States.

## PRAYER FOR WRIT.

Wherefore, your petitioners, by their undersigned counsel, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the First Circuit demanding that court to send to this court for its review and determination on a day certain to be therein named a full and complete transcript of the record and also pleadings in the case entitled *Garford Trucking Corporation, et al.*, Defendants, Appellants, v. *Joseph Mann*, Plaintiff, Appellee, being designated and numbered on its Docket October Term 1946, No. 4244 and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court to the end that your petitioners may have the relief therein prayed for and such other and further

relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

GARFORD TRUCKING CORPORATION,
J. ALBERT GLOGOWSKI,
*by their Attorneys,*
HERBERT S. AVERY,
MICHAEL T. PRENDERGAST,
112 Water St., Boston, Mass.

CERTIFICATE.

I hereby certify that Michael T. Prendergast of Boston and I are counsel for the petitioners herein, Garford Trucking Corporation and J. Albert Glogowski; that in accordance with the request of said petitioners the within petition has been presented; that the allegations contained in said petition are true, to the best of my knowledge and belief and that the said petition is, in my opinion, well founded in law and in fact and should be granted.

HERBERT S. AVERY.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss., Boston, September 5, 1947.

Then personally appeared Herbert S. Avery of Boston, Masachusetts, and made oath that he caused the foregoing petition to be prepared and signed the same and that same is prepared with the consent of and in accordance with the request of the petitioners named therein and that the allegations contained in said petition are true to the best of his knowledge and belief.

Before me,

ELI FLEISHMAN,
[SEAL] *Notary Public.*

My commission expires August 13, 1954.

## BRIEF IN SUPPORT OF PETITION.

In support of the allowance of the petition the following is respectfully submitted:

## ARGUMENTS AND AUTHORITIES.

### I.

### THE COURSE OF REASONING AND DECISION RENDERED BY THE CIRCUIT COURT OF APPEALS IN THE CASE AT BAR AS IT RELATES TO THE ADMISSIBILITY OF HEARSAY EVIDENCE AS TO THE ALLEGED STATEMENTS MADE BY THE DRIVER, GLOGOWSKI, A WEEK TO TEN DAYS AFTER THE ACCIDENT AGAINST THE CORPORATE DEFENDANT'S OBJECTIONS IS CONTRARY TO AND IN CONFLICT WITH THE DECISIONS OF THIS HONORABLE COURT AND OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

In his action against the corporate defendant, Garford Trucking Corporation, a vital issue on which the plaintiff had the burden of proof was the question whether or not at the time of the happening of the accident the truck and trailer of the Garford Trucking Corporation was being operated by its servant in the course of his duty and employment for the corporate defendant.

It is well settled that the law governing the right to recover in this action is the law of the state where the accident occurred and that although the action may be tried in the United States District Court, the court must apply the law of the Commonwealth of Massachusetts in which the occurrence took place.

> *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 82 Lawyers Ed. 1188.

The trial court unquestionably recognized this and undertook to govern the trial accordingly.

An important issue affecting the interest and rights of

the appellant, Garford Trucking Corporation, is: Was the defendant, Glogowski, acting within the scope of his employment as an agent of the defendant, Garford, at the time of the happening of the accident?

The defendant, Garford, says that Glogowski was not acting within the scope of his employment at the time of the accident; that he had abandoned for the time being the business of the defendant, Garford, on which he was supposed to be engaged; that he had departed from the route over which he should have traveled and that he was engaged upon the project in transporting a sailor to his home in violation of the direct instructions of the defendant, Garford and that the plaintiff, Mann, failed in his burden of proving that Glogowski was acting within the scope of his employment at the time of the accident and is not entitled to recover against the defendant, Garford.

The accident occurred on May 9, 1945. This country was engaged in the prosecution of the greatest war of history. Our whole domestic economy was subjected to most stringent regulations and restrictions, all designed to more effectively prosecute that war.

Coincidentally V.E. Day and the surrender of Germany had been announced on that very day but with the announcement came also the admonition of the President that we must still prosecute diligently the war against Japan.

The motor carrier transportation in which the defendants were then engaged was subject to strict regulations by the Office of Defense Transportation. General orders and regulations issued by the Office of Defense Transportation had the force and effect of law and were binding upon both defendants. Section 501-6-(b)2 of said General Order issued by the Office of Defense Transportion contains the following:

> "No common carrier shall accept or receive any property for transportation over any circuitous route

except when no adequate common carrier service over a direct route is available or except when the direct route is unsafe or unusable or is more destructive to tires or motor trucks."

Section 501-126 prescribed as follows:

"Limitation on Speed. No person shall drive or operate or cause, permit, suffer or allow to be driven or operated any motor vehicle within the continental limits of the United States at a rate of speed which is (1) in excess of the applicable speed limits duly prescribed by competent public authority or (2) in excess of 35 miles per hour, whichever rate of speed is the lesser."

The two foregoing regulations were in full force and effect, were not repealed until after V.J. Day in August, 1945 and were binding alike on the defendant, Garford and the defendant, Glogowski.

The defendant, Glogowski, was an experienced driver, had been employed by the defendant, Garford, for a considerable period before the accident and the defendant, Garford, had a right to rely upon his obedience to the emergency regulations of the wartime restrictions and in the absence of any express instructions, the defendant, Garford, had a right to expect that Glogowski, in the performance of his duties would travel the most direct route which would have been Route 126 to Route 9 and from Route 9 to Route 20; that he would not take in the performance of his duties, the longer route, 126 to Route 20, thereby traveling nearly twice as far as he would have traveled if he had taken Route 9 to Route 20. But the evidence of the defendant, Garford, goes further and establishes the fact that Glogowski was given explicit instructions as to the route which was the shortest route and that he should travel to Route 9 and by Route 9 to Route 20.

It is, therefore, clear that Glogowski, when he departed from Route 9 and headed north along Route 126, had departed from his employment with the defendant, Garford, not only by a direct violation of the law which required him to travel by Route 9, but by direct violation of the instructions of the defendant's manager. It is also clear that the defendant, Glogowski, intentionally departed from the obligation which he owed to his employer, Garford, when he took on for transportation the sailor, Chasse, well knowing the rule of the defendant, Garford, that no riders were to be permitted on their vehicles.

If the plaintiff's evidence is to be believed as to the rate of speed at which the defendant, Glogowski, was driving his motor vehicle at the time of the accident, the plaintiff, by his evidence, has proved another ground on which the defendant, Glogowski, had departed from his duties to his employer in violation of the rate of speed limitations prescribed by the regulation of the Office of Defense Transportation.

It, therefore, follows that the plaintiff, by his evidence, has shown not that the defendant, Glogowski, was acting within the scope of his duties owed by him to his employer, but that he was acting outside of the duties imposed upon him toward his employer, first, in departing from the most direct route to his destination, second, in taking on a rider or passenger and third, in exceeding the speed limit imposed upon him by law.

Certainly under these circumstances it cannot be said that the plaintiff has sustained the burden of proof imposed upon him to establish that the defendant, Glogowski, was acting within the scope of his employment for the defendant, Garford, but rather, it must be held as a matter of law that the plaintiff has failed in meeting the burden of proof required of him.

You may search the record from first to last and you will find not one scintilla of evidence as to why the defendant,

Glogowski, should have been operating the motor vehicle on Route 126 or Concord St. traveling north away from the Worcester Turnpike in pursuance of any duty he owed to his employer, except the alleged declarations referred to in the judge's charge (R., p. 260. See also R., pp. 126, 127, 93).

These alleged statements of the defendant, Glogowski, were not any part of the *res gestae*. They were not made in the presence of any officer or representative of the defendant, Garford Trucking Corporation; they were made at a time more than a week after the accident; they could have no binding effect on the defendant, Garford and the judge was right in his original ruling excluding them from consideration in the Garford case.

In *Du Bois* v. *Powdrell,* 271 Mass. 394, 397, a witness was permitted to testify, *without objection,* that immediately after the accident the minor defendant, in reply to a charge that he was driving fast, stated: "My mother sent me to the telephone office to telephone to my father." With reference to this testimony, the court said:

> "This testimony was relevant to the issue of agency, tended to prove that the minor defendant was driving the automobile for his mother and was sufficient to carry the case to the jury. An alleged agent 'may be called as a witness and the agency may be shown by his testimony'—but in general his statements made out of court as to facts tending to show agency are inadmissible for that purpose because hearsay— Such statements are not competent as admissions by the principal binding upon him in the absence of independent evidence of the authority of the alleged agent to make them—and of evidence that they were brought home to the alleged principal— The testimony as to the statement of the minor defendant, however, *was admitted without objection or application for restric-*

*tion of its use.* No specific ruling on its competency was sought or made later and no question with respect thereto was raised by the motion for a directed verdict— Whether or not the testimony, if objection had been made, would have been admissible for any purpose in the circumstances of the case, it was entitled to its natural probative force as tending to show by a statement of the minor defendant but not by an admission on the part of his mother, that he was driving the automobile on an errand for her when the plaintiff was injured. No rule of substantive law precluded consideration of this testimony as in the case of parole evidence bearing a written instrument admitted without objection."

It will be seen from the foregoing that the *Du Bois* case is no authority for permitting the consideration of the evidence objected to on the question of agency because in the case at bar there was specific objection to the admission of the evidence and by order of the court the testimony was limited and made applicable only to the defendant, Glogowski.

In *Sylvester* v. *N.Y.N.H. & H.R.R. Co.*, 217 Mass. 148, 152, the court said:

> "The evidence of Jeffrey's statement does not appear to have been admitted as the declaration of the alleged agent to show the nature and extent of his authority. That would have been incompetent."
>
> *Brigham* v. *Peters*, 1 Gray 139; *Baker* v. *Gerrish*, 14 Allen 201; *Stollenwerck* v. *Thacher*, 115 Mass. 224.

In *Jackson* v. *Colonial Provision Co., Inc.*, 314 Mass. 177, 179, the court said:

> "The only evidence of authority is found in the testimony of Rabinowitz, he was asked, 'Did you conduct

negotiations which were conducted on behalf of the Colonial Provision Co. with regard to the property down on Ferry St.?' He answered, 'Yes.' It could be found that the negotiations included the hiring of the plaintiff. The defendant argues that the answer meant merely that Rabinowitz conducted negotiations, not that he concluded them with authority but the jury could take it that negotiations—conducted on behalf of the defendant meant negotiations conducted with its authority. This was *testimony,* not a declaration out of court (*Segal* v. *Allied Mutuals Liability Insurance Co.,* 285 Mass. 106, 109) and cases like *Du Bois* v. *Powdrell,* 271 Mass. 394, 397; *Treasurer and Receiver General* v. *MacDale Warehouse Co.,* 262 Mass. 588, 592, 593; *Morrison* v. *Tremont Trust Co.,* 252 Mass. 383, 388, have no application. It is true that the question would doubtless have been excluded upon objection as one calling for a conclusion of law upon unstated facts—but there was no objection and the testimony was admitted. It was as much evidence of the facts as though no objection lay to its admission— It constituted sufficient evidence of agency to take the case to the jury."

From the foregoing it is clear that the trial judge was correct in his original ruling when the alleged statements of Glogowski made in the hospital a week or ten days after the accident was offered through the testimony of the plaintiff and of the witness, Davis, against the objection of the defendant, Garford. At that time the trial judge ruled that the evidence was admissible only against the defendant, Glogowski and was not to be considered against the defendant, Garford.

It is also clear that the trial judge erred later in the course of his charge to the jury when he instructed the jury that they might consider the alleged statements of

Glogowski made in the hospital a week or ten days after the accident in the case against the defendant, Garford, in order to establish the state of mind or purpose of Glogowski in operating his vehicle at the point of the accident.

It cannot be questioned but what the testimony offered of the alleged statements of Glogowski in the hospital a week or ten days after the accident was hearsay testimony. It may well be conceded that if Glogowski had been on the witness stand and had testified to the facts in accordance with the alleged statements made by him in the hospital, that his testimony would have been admissible against the corporate defendant. That would have been testimony of a witness as to facts within his own knowledge.

It might well also be conceded that if Glogowski had been on the witness stand and had testified that he never made such statements as he was alleged to have made in the hospital, the testimony of the plaintiff and of the witness, Red, might then have become admissible against Glogowski for the purpose of discrediting the testimony of Glogowski.

Even then the testimony of the alleged statements of Glogowski in the hospital ten days after the accident would not have been evidence of the facts and could not have warranted a finding by the jury that that was the fact and that that was the purpose of Glogowski in operating his vehicle at the point of the accident. The most that the jury would be warranted in finding would have been that Glogowski's testimony was unreliable because he had made one statement on the witness stand and another statement at another time.

The trial judge appears to have been misled as to the meaning of the cases which have been cited as authority for permitting hearsay testimony as to statements made by a party on other occasions being admissible to show the state of mind of that party. All of these cases establish

clearly the proposition that as to the defendant, Glogowski, statements later made by him will be admissible under proper circumstances against him for the purpose of establishing his state of mind at the time of the accident. But it is clear that evidence which is admissible to show the state of mind is received not in order to establish the truth or falsity of the statements but merely to establish mental condition of the declarant at the time of making the statements.

The proposition is well stated by the court in *Brady* v. *Doherty,* 253 Mass. 518, 522. Starting on page 521.

> "The trial judge refused to allow her to testify to the truth or falsity of such statements and ruled in substance and effect that the declarations so made were not to be taken by the jury as evidence of the fact that the contestant sisters had tried unduly to influence him but only as tending to show his state of mind—whether it was a mind that was subject to undue influence. At common law the limitations placed upon the evidence by the trial judge was correct; it was in conformity with the rules stated in the leading case of *Shailer* v. *Bumstead,* 99 Mass. 112 and many later decisions of this court. In *Shailer* v. *Bumstead* it was said by the judge at pages 120, 122, 126, 'So it is universally uniformly held that the previous declarations of the testator offered to prove the mental facts involved are competent— Statements and declarations when the state of mind is the fact to be shown are, therefore, received as mental acts or conduct. The truth or falsity of the statements is of no consequence. As a narration it is not received as evidence of the facts stated. It is only to be used as showing what manner of man he is who makes it— It is difficult to say that declarations offered to establish mental facts of this description are of equal weight whether occur-

ring before or after the acts in question but if they are equally significant—they are equally competent and may be quite as influential with the jury— All this evidence under whatever view it is admitted is competent only and always to establish the influence and effect of the external act upon the testator himself, never to prove the actual fact of fraud or improper influence in another. *Hater* v. *Norton,* 188 Mass. 47, 52; *Aldrich* v. *Aldrich,* 215 Mass. 164; *Emery* v. *Emery,* 222 Mass. 439; *Neill* v. *Brackett,* 234 Mass. 367; N.C. 241 Mass. 531, 537. The limitation upon the testimony of the contestants respecting declarations and statements made by the testator was sufficiently favorable to her within the rules stated in *Shailer* v. *Bumstead Supra* and other cases where that rule has been subsequently applied."

It is obvious from the foregoing that the alleged statements of Glogowski in the hosptal, so far as they were admissible to show a state of mind, could be admissible only against him and if admitted for the purpose of showing state of mind, would be limited by the established rule for that purpose only and would have no weight as to the truth or falsity of the fact itself.

Quite another situation is presented when considering the admissibility of such testimony against the employer of Glogowski, the corporate defendant.

The court must not lose sight of the fact that when the testimony was originally offered upon objection of the corporate defendant it was carefully limited by the court and made applicable to Glogowski alone. In this there was no error and the appellee-plaintiff reserved no exception thereto. That ruling of the court became the law of the case for the conduct of the parties in connection therewith. The ruling of the court accorded correctly with the established law of the Commonwealth.

In *Conklin* v. *Consolidated Railway Co.*, 196 Mass. 302, 305, you will find the clear statement of the principle governing the case at bar. In that particular case the court says:

"The witness, Jacobs, was allowed against the exception of the defendant to testify that the defendant's conductor, Killoy, while on the defendant's car had said in a talk with the witness that he would have assaulted someone on the car before he got through. The plaintiff was not on this car and the time of the talk was no further fixed than by the witness' statement that it was a comparatively short time before the alleged assault on the plaintiff. It was agreed on both sides that there was an encounter between the conductor and the plaintiff but there was much contradictory evidence as to which of them was the aggressor. The jury were instructed to consider the testimony of Jacobs only upon the question whether the conductor did or did not begin the assault.

"The plaintiff's counsel contends that this evidence was competent on the general doctrine that upon the issue whether a person has done an act evidence of an intention or design in his mind to do that act is material and that his contemporaneous acts and declarations tending to show that he has such intentions are competent to show this fact. *Commonwealth* v. *Trefethen*, 157 Mass. 180; *Innis* v. *Boston, Revere Beach & Lynn R.R.*, 168 Mass. 433; *Viles* v. *Waltham*, 157 Mass. 542; *Commonwealth* v. *Crowley*, 165 Mass. 569.

"If this action were against the conductor himself the plaintiff's contention would be well founded. A defendant's intention or preparation to commit the particular wrong which it is charged he afterwards did commit, may always be shown in evidence against him. There are many decisions to this effect. *Commonwealth* v. *Williams*, 2 Cush. 584; *Commonwealth* v. *Choate*, 105

Mass. 451; *Commonwealth* v. *Chase,* 147 Mass. 597; *Commonwealth* v. *Quinn,* 150 Mass. 401; *Commonwealth* v. *Crowe,* 165 Mass. 139.

"Nor is it necessary that a threat of violence such as was here in question should be directed against a particular person upon whom the wrong was afterwards committed, if there was such a general threat or such an indication of the general malicious intent as could properly be found to have included that person within its scope—

"But in our opinion the question of the admissibility of this evidence must be determined upon the principle that the mere declaration of a servant or agent not within the scope of his employment or authority is admissible against his employer or principal *only when it constitutes a part of the res gestae,* when it either accompanies an act which is itself competent and material to be proved and which it tends to qualify, characterize or explain or when it is itself a part of the transaction under investigation. It is conceded that this is the general doctrine both of our own decisions and of those of other jurisdictions. We perceive no logical difference in the application of this principle between declarations made before and those made after the event in question and the very argument made here that such declarations even though not in themselves binding on the master, are yet competent to show the state of mind or the intention of the servant who made them, has been held to be unavailing— It is no more competent for a mere servant to make evidence against his employer by an antecedent statement or manifestation of his feeling than by any other admission he may be willing to make.

"We need not consider whether this evidence would

have been admissible if the declaration had been made while the plaintiff was on the car and with direct reference to him. Under the circumstances before us the question presented is almost exactly the converse of that which was considered in *Bonino* v. *Caledonia*, 144 Mass. 299, 402 and must be governed by the reasoning of that case. We are unable to avoid the conclusion that this evidence ought not to have been admitted and it undoubtedly must have been prejudicial to the defendant."

In *Boston Food Products Co.* v. *Wilson & Co.*, 245 Mass. 550, 561, the court said:

"There was evidence for the jury that Heyer was the defendant's general manager and authorized to make the contract in question but the admissions of the general manager which are not made in the performance of his duties as such general manager are not admissible against his principal. *Wellington* v. *B. & M.R.R.*, 158 Mass. 185; *Gilmore* v. *Mittineague Paper Co.*, 169 Mass. 471; *Brackett* v. *Commonwealth*, 223 Mass. 119, 127.

In *B. & M.R.R. Co.* v. *Ordway*, 140 Mass. 510, 512, the court said:

"Evidence that Flanders made certain admissions tending to establish the company's liability was not made competent by the fact that he was the company's freight agent without more. A freight agent cannot affect his principal by admissions merely as such. In the cases cited for the defendant in review the admissions were statements made when delivery of the goods was applied for—or when information was sought from the person designated by the general representative of the principal—or in some other similar way was raised from the rank of mere admissions to authorized acts

done on behalf of the principal in furtherance of the principal's legal duty. The admissions, too, were not mere admissions of liability but were specific facts which it was the agent's province to know— Here, even if we assume that deliverance admissions were specific facts, the goods had been delivered and opened before the conversation and there is nothing to show that the freight agent had any further duty to perform or if he had, that he was attempting to perform them."

The Circuit Court of Appeals, in its opinion in the case at bar, did not properly construe the effect of the cases cited by it on the issue now being discussed.

In *Elmer* v. *Fessenden*, 151 Mass. 359, cited by the Circuit Court of Appeals, it appears that the plaintiffs then, to prove the reason why they stopped work, asked the witness whether they gave any reason for stopping work. This question was excluded by the court. The plaintiff afterwards asked:

"*Q.* What, if anything, did they say as reason for stopping?"

This question the court also excluded.

As to this excluded testimony, the court, in its opinion at page 362, said as follows:

"As a rule such declarations are not evidence of the past facts which they may recite. The cases in which they have been admitted prove the cause of a wound or injury when the declarations were made at the time or immediately after the event, if not exceptions to the general rule, at least mark the limit of admissibility. *Commonwealth* v. *Hackett*, 2 Allen 136, 140; *Commonwealth* v. *McPike*, 3 Cush. 181, 184; *Insurance Company* v. *Mosley*, 8 Wall 397.

"The excluded testimony was not competent to prove

that the defendant did tell, a workman, the story. As to that it was mere hearsay and was not within the scope of the special reasons which led to the decisions last cited."

In *Partridge* v. *United Elastic Corp.*, 288 Mass. 138, cited by the United States Circuit Court of Appeals, evidence was admitted as to statements made by the intestate prior to the happening of the accident but this evidence was admitted under the special statute permitting the statements of deceased persons to be admitted and the case, therefore, has no application to the case at bar.

There is nothing in *Lawlor* v. *Lowe*, 235 U.S. 522, 526, cited in the opinion of the Circuit Court of Appeals, to support the court in suggesting in its opinion that a different rule as to admissibility of evidence of this character may apply under the Federal law than under the law of the Commonwealth of Massachusetts. This suggestion is contrary to the decision of this court in *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 68 and contrary as well to the rule laid down by this court in the case of *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, where, at page 498, the court said:

"A kindred principal governs in regard to the declarations of agents. The principal constitutes the agent representative in the transaction of certain business; whatever, therefore, the agent does in the lawful prosecution of that business is the act of the principal whom he represents and where the acts of the agent will bind the principal there his representations, declarations and admissions respecting the subject matter will also bind him *if made at the same time and constituting part of the res gestae.* They are of the nature of original evidence and not of hearsay. The representation or statement of the agent in such cases being the ultimate fact to be proved and not an admission of some other fact, but it must be remembered that the admis-

sion of the agent cannot always be assimilated to the admission of the principal. The party's own admission, wherever made, may be given in evidence against him but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending *et dum fervet opus.* It is because it is a verbal act and part of the *res gestae* that it is admissible at all and, therefore, it is not necessary to call the agent himself to prove it but wherever what he did is admissible in evidence, there it is competent to prove what he said about the act while he was doing it and it follows that when his right to act in the particular manner in question has ceased, the principal can no longer be affected by his declarations, they being hearsay."

This latter statement just quoted establishes clearly the fact that the testimony as to the statements alleged to have been made by Glogowski in the case at bar a week or ten days after the accident while he was in the hospital as to his purpose in traveling on the route on which he was traveling at the time of the accident were clearly inadmissible against the defendant, Garford and the instruction of the trial court that the jury might consider them in determining the purpose for which the truck was being operated at the time of the accident was such error as to be prejudicial to the defendant, Garford and for this reason, if no other, the judgment of the District Court and the opinion and decision of the Circuit Court of Appeals must be reversed.

II.

**WITHOUT THE TESTIMONY OF THE ALLEGED STATEMENTS OF GLOGOWSKI MADE IN THE HOSPITAL TEN DAYS AFTER THE ACCIDENT THE PLAINTIFF FAILED TO ESTABLISH HIS BURDEN OF PROVING THAT AT THE TIME OF THE ACCIDENT THE TRUCK OF THE CORPORATE DEFENDANT WAS BEING OPERATED IN THE COURSE OF THE BUSINESS OF THE CORPORATE DEFENDANT.**

The uncontradicted evidence required a finding that at the time of the accident the tractor and trailer of the defendant, Garford, was being driven on a route headed in the opposite direction from that in which it should have been driven if the driver were pursuing the shortest route to its destination; that there was upon the tractor at the time a passenger in direct violation of the rules of the defendant, Garford and that the direction in which the truck was traveling was toward the home of this passenger.

There is no other evidence as to the ultimate course to be taken by the operator of the truck.

There is evidence that at a point some distance from the accident he would have reached a route by which he could return to the route on which he should have traveled but there is no evidence other than that we have heretofore discussed on which the jury would have been warranted to find that it was the purpose or intention of the driver to take that other route when he reached it. The driver himself, in his testimony, said nothing about it and the evidence was without contradiction, that even if the driver was to have taken the route which would return him to the course in which he should have traveled, he must altogether have traveled about twice as far as he would travel if he had taken the direct route.

This was in direct violation of the law then in force requiring him to travel by the most direct route.

The court should have in mind in the case at bar that

at the time of the accident Glogowski had left behind him at least three routes which would have taken him directly to Worcester including the Worcester Turnpike; that he had already left behind him the last street by which he could have reached the Worcester Turnpike directly and that he was headed directly away from the Worcester Turnpike and away from Worcester in a northerly direction when he should have been traveling southerly; that the route which he was traveling would take him some 18 miles farther than he would be required to travel if he had taken the Worcester Turnpike; that it would take him through several small towns and over several long hills; that it was a two-lane highway instead of a four-lane highway; that it contained many curves from which, it necessarily followed, there would be a greater consumption of gasoline, a greater wear and tear on tires, the preservation of both of which were made imperative under the wartime regulations then in force and greater likelihood of accidents.

The case at bar is a stronger one for the corporate defendant than that of *Fleischner* v. *Durgin,* 207 Mass. 435, 436, (R., p. 262). That case, when applied in the case at bar, is sufficient authority to have required the judge to have directed a verdict for the defendant, Garford.

In the case at bar Glogowski had embarked upon a trip, the only apparent purpose for which was to carry a rider in violation of his master's orders, to a destination for the benefit of the rider, which trip would take him 15 miles away from his direct route with no evidence that he even intended to return to his direct route. In the *Fleischner* case the divergence from the direct route was six miles and yet the court held that it was a sufficient divergence to preclude the plaintiff from recovering. See also *Hartnett* v. *Grygmish,* 218 Mass. 258; *Stone* v. *Commonwealth Coal Co.,* 259 Mass. 360; *Vallavanti* v. *Armour & Co.,* 260 Mass. 417.

Thus it clearly appears that the trial court and the Circuit

Court of Appeals erred in two important respects prejudicial to the defendant, Garford. First, in permitting the jury to consider as evidence against the defendant, Garford, alleged statements made by Glogowski in the hospital a week or ten days after the accident and second, in failing to direct a verdict for the defendant, Garford, on the ground that the plaintiff had failed to establish that the truck was being operated at the time of the accident in the course of the business of the defendant, Garford.

## CONCLUSION.

Your petitioners respectfully submit, therefore, that this Honorable Court should grant Certiorari in this case.

Respectfully submitted,

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